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IN THE

Supreme Court of the United States

October Term, 1963
No. 624

TEMESCAL WATER COMPANY; and JAMES A. STEIN, on his own behalf and on the behalf of shareholders of Temescal Water Campany,

Petitioners,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of California.

PETITIONERS' REPLY BRIEF.

I.

A Reply to Respondent's First Argument: The Rate Regulation Is Shown to Be Arbitrarily Devised—Not Being Based on Evidence—and to Be Confiscatory.

The first argument made by respondent Public Utilities Commission in its brief is related to the reasonableness of its rate regulation as applied to petitioner Temescal.

Respondent first considers Temescal's "novel p oposa' for 'non-profit rates'" and justifies its rejection of

the proposal on the grounds that the year-end adjustment feature would constitute retroactive ratemaking (Resp. Br. 2-6). Respondent describes the rate adopted in Decision No. 65115 as one "designed to bring in revenues and result in charges approximating" the existing non-profit rates, but eliminating "the suggested device of a year-end assessment refund provision" (Resp. Br. 5).

Pages 6 to 10 of the brief are concerned with the evidence relating to Decision No. 65115. Temescal, in its petition for a rehearing of the decision before the respondent and in its petition for a writ of review to the Supreme Court of the State of California, objected that the decision was arbitrary and was not based on evidence, and that the rate was confiscatory [Tem. R. 9-12, 48-52].

Although respondent submits that there is abundant evidence in the record relating to the rate proposals, it makes no reference to particulars. Respondent claims its ratemaking is based on "Considerable judgment and expertise" (Resp. Br. 9), but the decision itself discloses: 1) "There is nothing in the record before this Commission at this time to enable it to establish a rate base" [Tem. R. 19]; 2) "Because the utility's books do not properly segregate expenses from capital expenditures, it could not be determined whether or not these rates will require the addition of nonutility income to pay the total expenses of the company" [Tem. R. 34]; and 3) "There is in the record, however, nothing on which the Commission could determine the water operating expenses alone" [Tem. R. 36].

Petitioners do not expect ratemaking to be an "exact science" (Resp. Br. 8), but insist that ratemaking based on conjecture is arbitrary, and that when the established rate requires the utility to operate at a loss the federal requirement of due process of law is offended.

II.

A Reply to Respondent's Second Argument: Regulation of Private Water Service Amounts to an Impairment of the Obligation of Contract and the Deprivation of Property Without Due Process of Law.

At the outset of its brief, respondent Public Utilities Commission correctly states that its Decision No. 59443 and the opinion of the Supreme Court of the State of California in *Corona City Water Company v. Public Utilities Commission*, 54 Cal. 2d 843, 357 P. 2d 301, "are not the subject of the review sought here, having been final and *res judicata* as to the issues raised therein" (Resp. Br. 1-2). The question remains: What issues were raised therein?

Petitioners assert that the question of the extent of dedication of property in the Temescal system to public service was not an issue in Decision No. 59443 and in the *Corona* case [Tem. R. 7-8, 47-48, 52, 117-119; Stein R. 4-9, 40-47, 54-56, 94-101]; and petitioners dispute the assumption of respondent that, because the decision and opinion did not specify what property of Temescal was devoted to public service, it follows that all property used or useful in water service is devoted to public service [Tem. R. 93; Stein R. 76].

Respondent concedes that a water company may engage in part in public service and in part in private

service, and that the latter is not subject to public utility regulation (Resp. Br. 13). Although respondent says "Dedication was found as to the whole" (Resp. Br. 13), no reference to the record is given to support the statement, nor does the record support the statement.

> "To hold that property has been dedicated to a public use is not a trivial thing '. . . and such dedication is never presumed without evidence of unequivocal intention' (*Allen v. Railroad Commission*, 179 Cal. 68, 85; 175 Pac. 466, 473)."

There is no evidence in the record that Temescal is engaged in public service as to its irrigation shareowners, which distinguishes this case from the cases cited by respondent under its second argument. To apply rates and regulations to such water service amounts to an impairment of the obligation of contract and the deprivation of property without due process of law.

As to petitioner Stein, that petitioner repeats here what he has urged before: His appearance is not made to advance a shareholder's derivative action but to assert individual, real property rights in the Temescal water system [Stein R. 97-101]. The summary dismissal by the respondent and by the Supreme Court of the State of California [Stein R. 33, 102] of these claims of right judges these claims without ever having given the irrigator-shareowners of Temescal their day in court.

III.

Conclusion.

Petitioners, before coming to this Court, submitted verified petitions for a writ of review to the Supreme Court of the State of California, urging that Decision No. 65115 of the respondent Public Utilities Commission violated their rights under the Constitution of the United States. Their petition was refused by the Supreme Court of the State of California. This petition is their last recourse.

It is no help to petitioners to be told that they can seek an eventual amelioration of respondent's Decision No. 65115 by application for a new rate (Resp. Br. 10), since such application must necessarily be within the boundaries of the excess of jurisdiction complained of here.

Petitioners pray that a writ of certiorari be issued to review the judgment of the Supreme Court of the State of California affirming Decision No. 65115 of the Public Utilities Commission of the State of California.

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